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No. 288

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In the

Supreme Court of the United States

October Term, 1963

FRED DUNLAP and JAMES BARBOUR,
Appellants,

v.

THE STATE OF OHIO,
Appellee.

On Appeal from the Supreme Court
of the State of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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Now comes the State of Ohio, Appellee, by Raymond E. Shannon, Prosecuting Attorney of Hamilton County, Ohio, William S. Mathews and Calvin W. Prem, Assistant Prosecuting Attorneys of Hamilton County, Ohio, and respectfully move the Court for an order dismissing this appeal for the reason that there have been no denials of appellants' federal constitutional rights in the proceedings below.

JURISDICTIONAL STATEMENT

The appeal of appellants, Fred Dunlap and James Barbour, from the judgment of the Supreme Court of the State of Ohio, presents the question whether the appel-

lants' conviction of violating *Section 3719.16, Par. 2, of the Ohio Revised Code,* was consistent with the principles of due process, as is guaranteed in the Fourteenth Amendment to the Constitution, as well as the Eighth Amendment to the Constitution of the United States, which forbids cruel and unusual punishment.

OPINIONS BELOW

The brief of appellants clearly cites the opinions and judgments below.

THE STATUTE

The statute involved is Par. 2 of *Section 3719.16, Ohio Revised Code.*

QUESTIONS PRESENTED

The questions presented by the appellants on this appeal are:

1. Whether the *Section 3719.16, Par. 2, of the Ohio Revised Code,* is so vague and indefinite that it fails to provide notice to appellants that their conduct was unlawful; and

2. Whether the punishment provided by law for the violation of *Section 3719.16, Par. 2, Ohio Revised Code,* is cruel and unusual punishment.

I. STATEMENT OF THE CASE

The within cases are joined in a single brief since the fact situations and questions involved in both are identical.

The defendant-appellant, Fred Dunlap, hereinafter referred to as "Dunlap", waived his right to trial by jury, and trial was had in June, 1961. The defendant-appellant, James Barbour, hereinafter referred to as "Barbour", also

waived trial by jury, and was tried by the court in October, 1960. In both cases the court overruled defendants' demurrer to the indictment. Both defendants were found to be guilty as charged.

The judgment of the trial court was affirmed by the First District Court of Appeals of Ohio, without opinion.

The Supreme Court of Ohio dismissed the appeal to it for the reason that no debatable constitutional question was involved.

II. THE FACTS

On March 17 and 18, 1960, Dunlap, and on March 12 and 13, 1960, Barbour, entered numerous drug stores in the City of Cincinnati.

The record shows that Dunlap purchased nine one ounce bottles of paregoric in seven drug stores on March 17 and 18, 1960. Defendant, Barbour, purchased nine one ounce bottles of paregoric in five drug stores on March 12 and 13, 1960.

In all instances both defendants were required to sign their names, addresses and date of purchase in an "exempt narcotic register" kept, as required by law, by each of the pharmacists.

As a result of an investigation, examination and inspection of the various "exempt narcotics registers" the defendants, and fifteen other persons, were separately arrested and indicted for violation of *Section 3719.16 of the Ohio Revised Code.*

III. ARGUMENT

Appellants contend that the record demonstrates a denial to them of the constitutional guarantees of due process under the Fourteenth Amendment of the United States Constitution, in that the statute involved is vague and

indefinite; and that the constitutional guarantees of the Eighth Amendment of the United States Constitution have been denied them because, as applied here, a cruel and unusual punishment was inflicted on the appellants by virtue of the penal provisions of the statute.

THE STATUTE IS NEITHER VAGUE NOR INDEFINITE AND DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Appellants contend that the statute failed to provide them with notice of the illegality of their acts.

The broad power of the state to regulate the narcotics traffic within its borders has long since been decided by this court. Over forty years ago the Court:

> "explicitely recognized the validity of that power; 'there can be no question of the authority of the state, in the exercise of its police power, to regulate the administration, sale, prescription and use of the dangerous and habit forming drugs * * *.' The right to exercise this power is so manifestly in the interest of the public health and welfare that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question."
>
> *Whipple* v. *Martinson,* 256 U. S. 41 at page 45.

The Ohio Legislature has seen fit to prohibit possession of any narcotics, without prescription, by any person "except a manufacturer, wholesaler, practitioner, pharmacist, owner of a pharmacy, or other person authorized to administer or dispense narcotic drugs by the provisions of other sections of the Ohio Revised Code." *Section 3719.09 Ohio Revised Code.*

From the above it can be seen that we start off with the premise that no one, unless duly authorized, may, without prescription, possess narcotics in any shape or form. However, due to the small amount of narcotic content of certain medicinal preparations, the Legislature, under *Section 3719.15* of the Ohio Revised Code, has seen fit to make certain exceptions to this broad prohibition. These exceptions are set forth according to their chemical content, and not by trade name or otherwise.

A review of the Record of the trial (Transcript pages 16 to 18, Dunlap); (Transcript pages 4, 12, 18, 19, 24, 28, Barbour), discloses that the defendants purchased nine one ounce bottles of paregoric each from five separate drug stores on March 12 and 13, 1960, in the case of Barbour, and seven separate drug stores on March 17 and 18, 1960, in the case of Dunlap. And, upon cross-examination, the defendant, Barbour, admitted these purchases, (Transcript pages 47-50), and admitted that he had, in fact, purchased over a hundred bottles of paregoric in the month of March, 1960, (Transcript page 42), which he drank, (Transcript page 43). The testimony was had (Barbour Transcript page 3) from one of the druggists that "paregoric" contains approximately 1/4 of a grain of morphine to each ounce of the liquid preparation; and that it (paregoric) is manufactured in accordance with U. S. P. (United States Pharmacopoeia) standards. A stipulation was made by counsel for the defendants and counsel for the plaintiff (Barbour Transcript page 51) that the preparation known as "paregoric" contains benzoic acid, camphor, oil of anise, opium, alcohol, glycerine and distilled water; that all paregoric is manufactured under U. S. P. (United States Pharmacopoeia) standards; and that the finished product contains between .035 and .045 milligrams of morphine per fluid ounce.

Section 3719.16 Ohio Revised Code, Par. 2, under which the defendant-appellants were indicted, reads as follows:

> "No person shall obtain or attempt to obtain, under the exemptions of section 3719.15 of the Revised Code, more than one preparation exempted by the provisions of that section within forty-eight consecutive hours."

Section 3719.15, Ohio Revised Code, which is sometimes referred to as the "exemption" section, in so far as it is applicable to the instant case, reads as follows:

> "Except as specifically provided in sections 3719.01 to 3719.22, inclusive, of the Revised Code such sections shall not apply to the following cases:
>
> (A) * * * where a pharmacist or owner of a pharmacy sells at retail any medicinal preparation that contains in one fluid ounce * * *
>
> (2) Not more than one quarter of a grain of morphine or of any of its salts;"

Section 3719.09, Ohio Revised Code, provides as follows:

> "No person except a manufacturer, wholesaler, practitioner, pharmacist, owner of a pharmacy, or other person authorized to administer or dispense narcotic drugs by the provisions of sections 3719.01 to 3719.22, inclusive, of the Revised Code shall have in his possession or under his control any narcotic drug or narcotic drug preparation unless such drug is exempted under the provisions of section 3719.15 of the Revised Code, *and the quantity of such drug does not exceed two grains of opium, or one-half of a grain of morphine or any of its salts, or four grains of codeine or any of its salts, or two grains of dihydrocodeine or any of its salts, or one-half grain of ethylmorphine or any of its salts, or a quantity of any other narcotic drug or any combination of narcotic drugs that exceeds in*

pharmacologic potency any one of the drugs named above in the quantity stated, or unless such drug was obtained pursuant to a prescription issued by a practitioner and is in the original container in which it was dispensed to such person. Possession by a person not excepted by the provisions of this section of a narcotic drug not exempted by the provisions of this section is presumptive evidence of intent to violate the provisions of this section. (Emphasis added)

Therefore the Legislature has, by statute, enacted legislation which controls the narcotic traffic in the State of Ohio by providing that, without a prescription issued by a doctor, no person shall have any narcotic drug or narcotic drug preparation (excepting those preparations which are "exempted" by *Section 3719.15, Revised Code*) in his possession. *Whipple* v. *Martinson, Supra.* Certain narcotic drug preparations are "exempted" because of their actual narcotic content, per fluid ounce of preparation, is small. "Paregoric", which is a narcotic drug preparation manufactured under U. S. P. standards is one of the preparations which is considered an "exempted preparation" because it contains slightly less than one quarter of a grain of morphine in every fluid ounce of the finished product.

In ordinary usage, a one fluid ounce purchase of paregoric does not create or present any narcotic drug danger to the person having such narcotic drug preparation in his possession or under his control. The medicinal value of the preparation, in that quantity, outweighs the narcotic drug danger existing in so small a narcotic drug content. However, as the fluid quantity increases so does the total quantity of narcotic drug. Therefore, if we assume that paregoric contains exactly one quarter grain of morphine in every one fluid ounce of preparation, then two one ounce bottles of paregoric would contain one-half grain

of morphine, and four one ounce bottles of paregoric would contain a full grain of morphine. In the case at bar, defendant-appellant purchased nine one ounce preparations of paregoric from five different drug stores, in a two day period of time. Those nine one ounce preparations provided him with approximately two full grains of morphine. And, the defendant-appellant's admission that he actually purchased over one hundred one ounce bottles of paregoric during the entire month in question, represents his having obtained, and used, twenty-five full grains of morphine.

It should be further noted that both defendants, upon cross-examination in the trial of the within cause, admitted that they were narcotic addicts, and had been for some period of time.

It is respectfully represented that the Legislature, in regulating the narcotic traffic in this State, intended that narcotic drugs and narcotic drug preparations be obtained only by a doctor's prescription (*Section 3719.09 R. C.*) It recognized a medicinal value of certain drug preparations having a very small actual narcotic drug content in relation to the whole preparation and, therefore, exempted them from the prescription requirements of *Section 3719.-09, Revised Code of Ohio* (*Section 3719.15, R. C.*) By enacting this section (3719.15, R. C.) of the Code, the Legislature granted a privilege to dispense, or obtain, certain drug preparations having a small narcotic drug content without the prerequisite of having a doctor's prescription.

Having granted that privilege, however, the Legislature was concerned about the abuses in the handling of those "exempted preparations". It was mindful of the danger of any one person's ability to accumulate a quantity of narcotic drugs by making multiple purchases of otherwise exempted medicinal drug preparations. Therefore, the

Legislature enacted *Section 3719.16, Revised Code.* The second paragraph of that section prohibits any person from obtaining more than "one exempted preparation" within forty-eight hours.

In the case of *Robinson* v. *California,* 370 U. S. 660, this Court held:

> "In short, the range of valid choice which a state might make in this area (narcotics regulation) is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide.

Section 3719.09, Revised Code, has already provided that no one shall possess more than one-half grain of morphine or any of its salts (without a prescription). Paregoric is an "exempted preparation" because it does not contain more than one quarter of a grain in any preparation of one fluid ounce. Multiple purchases of one ounce preparations of Paregoric would result in an accumulation of morphine exceeding one-half of a grain. The Legislature, therefore, has limited the privilege of purchasing exempted narcotic drug preparations to not more than one such preparation in any forty-eight hour period.

From the facts in the cases at bar, there is no question that the defendants violated *Section 3719.16, of the Revised Code,* by making nine purchases of paregoric and obtaining nine ounces of same. A verdict of "guilty as charged" was returned accordingly.

The appeal to the First District Court of Appeals, and to this Court, has been taken on the claim that *Sections 3719.15 and 3719.16, of the Revised Code of Ohio,* are unconstitutional because they conflict with one another, and also that *Section 3719.16, Par. 2, of the Revised Code of Ohio,* is unconstitutional because it violates the provisions of *Article I, Sections 1, 16, and 19 of the Constitution of*

Ohio, and also the *Fourteenth Amendment to the Constitution of the United States.*

Article I, Section 1, of the Constitution of Ohio, is as follows:

> "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

Article I, Section 16, of the Constitution of Ohio, is as follows:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Article I, Section 19, of the Constitution of Ohio, is as follows:

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury without deduction for benefits to any property of the owner."

The *Fourteenth Amendment to the Constitution of the United States* is as follows:

> "All persons born or naturalized in the United States,

> and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

From a reading of the above indicated Sections of the Ohio Constitution, and the Fourteenth Amendment to the United States Constitution, it is difficult to believe that counsel for the defendants is serious in his position and claim that "the provisions of Paragraph two (2), Section 3819.16, Ohio Revised Code, is unconstitutional and violates the provisions of Article I, Sections 1, 16 and 19 of the Constitution of Ohio and the Fourteenth Amendment to the Constitution of the United States of America." It is claimed that "Section 3719.16, Paragraph 2 is arbitrary, unreasonable and a discriminatory exercise of the police powers of the State and deprives the defendants of Due Process and Due Course or Law." (Defendants' brief, Assignment of Error.)

Although the various sections of *Article I of the Ohio Constitution*, and the *Fourteenth Amendment of the Constitution of the United States*, are mentioned in the sole Assignment of Error set forth in the defendants' brief, the argument following, and in support of, the Assignment of Error, appears to be confined to the claim that the Revised Code Section involved in this case is an arbitrary, unreasonable and a discriminatory exercise of the police powers of the State.

First of all, counsel for the defendants has submitted that *Section 3719.16, of the Revised Code of Ohio*, is directed to a "class of people". That such contention is

completely erroneous requires only a reading of the language used in that section, i. e., "No person shall dispense or sell . . ." (in paragraph 1) and "No person shall obtain or attempt to obtain . . ." (in paragraph 2). Certainly, by no stretch of the even most over-active imagination can a reading of that language lead one to conclude that that legislation is directed to a "class" of people.

"No person", as used in *Section 3719.16, Revised Code*, means exactly what it says and applies to all persons of every race, color and creed, regardless of sex, marital status, financial status or educational achievement. Insofar as the case at bar is here concerned, the legislature, under the police powers of the State of Ohio, has prohibited everyone from obtaining, or attempting to obtain, within forty-eight hours, more than one preparation exempted under Section 3719.15, Revised Code.

It has been suggested that, to understand and interpret *Section 3719.16, Revised Code*, one must first be educated in chemistry and skilled in the numerical transpositions necessary to convert grams to grains, and vice vera. It is respectfully submitted that such claim is also not correct.

Counsel for the defendants, in an earlier brief filed in this case (in both the trial court and the Appellate Court) cited what he felt was a companionable example to this "educational" argument. The example he used in those briefs occurred when he wrote the following question pertaining to the liquor laws of this State:

> "What confusion would arise if suddenly the legislature, without warning, enacted legislation saying one could not purchase more than one preparation containing more than 100 cc of C_2H_2OH?"

Counsel then asked, "How can a citizen, with ordinary intelligence, know what it means?"

Such legislation (the liquor laws of the State of Ohio) creates a duty; a restriction, upon the consumer to know what he is obtaining, and how much he is getting. In actual practice, under the liquor laws, tavern owners are licensed and permitted to sell and dispense beer, wine and whiskey to the public, but they are regulated in what they sell, and how much, and to whom and when. And consumers are permitted to purchase the various intoxicating beverages, but the purchases are regulated in what is bought, who does the buying and when.

The example, as applies to the case at bar, would be seen in connection with the provision that only beer having a 3.2% alcoholic content can be purchased (or sold) on Sundays and certain other days of the year. A citizen, who makes himself a patron of any liquor dispensing establishment, on Sundays, does not have to be chemically and/or mathematically trained in order to know the law and comply with it.

Those laws, both the liquor laws and the narcotic laws, of this State, are designed to limit, regulate and control substances which could otherwise be extremely dangerous to the public. As such, those regulations are not unconstitutional. And, ignorance of the amount of chemical, or narcotic content, or whether a purchaser can understand chemical symbols, or whether he has any educational ability at all, is immaterial.

It would seem that, if the argument of counsel for the defendants, that his clients lack specialized chemical training, was with merit, then all illiterate persons should be totally immune from prosecution and punishment for any crime because they are unable to read and understand the statutes.

It is respectfully submitted that nowhere in the *Constitution of the State of Ohio*, or the *Constitution of the*

United States, can there be found any property right guarantee to purchase, obtain, possess and/or use narcotic drugs. On the other hand, the legislature has established the narcotic laws of this State with a view toward protecting the health, welfare and safety of society. As such, the statute here involved has a very real and substantial relation to that purpose.

The police power is one of the least limitable powers of government and includes anything which is reasonable, necessary and appropriate to secure the peace, order, protection, good health, comfort, quiet morals, welfare, prosperity and best interests of the public. It has been said that it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

There can be no question that narcotics, and the illicit traffic in narcotics, presents a field which constitutes a tremendous hazard to the peace, protection, good health, morals, welfare and best interests of the public. For that reason, laws governing, regulating and controlling all phases of the narcotics problem have been enacted by both the Federal and State Governments. It has been reported that the Ohio Legislation on this subject has resulted in a model law which has been, and is being, copied by other state legislatures in their efforts to curb and control narcotics traffic and other attendant crimes. Such legislation, enacted for the protection of the public, is entirely proper under the police powers of the State. *Whipple* v. *Martinson*, *supra*.

As has been previously stated herein, the legislature, under the police powers of this State, enacted the "narcotic laws" of which *Section 3719.16, Revised Code*, the complained of section, is a part. The purpose for those

laws, and the intention of the lawmaking body in passing them, is clear. The subject of the crime charged in the instant case is not a "chemical formula" (as counsel for defendants has suggested), but is "narcotic preparation".

From a reading of *Sections 3719.09, 3719.15 and 3719.16, Revised Code*, it is quite apparent that, under Ohio law, without a prescription, no person shall have any narcotic drug, or narcotic drug preparation, in his possession or under his control *unless* it is one of the exempted narcotic preparations and providing that the quantity possessed does not exceed two grains of opium, or one-half grain of morphine or any of its salts. There is no confusion or conflict in the ordinary reading and the ordinary meaning of the words used. It is plain that the legislature intended to regulate narcotics by requiring prescriptions for all narcotic drugs excepting those medicinal preparations which contain only a small amount of narcotic drug and are, therefore, in normal use, considered not to be dangerous. And, realizing the danger of a person's unrestricted ability to purchase those "exempted narcotic drug preparations" and thereby accumulate a quantity of narcotic drugs, the legislature limited and restricted the sale and purchase of those otherwise exempted preparations so that no one person can obtain more of the actual narcotic drug than two grains of opium or one-half grain of morphine or any of its salts.

Section 3719.16, Revised Code, states simply that no person shall obtain, or attempt to obtain, more than one exempted preparation (without a prescription) within any forty-eight hour period. There is absolutely nothing in the wording of that section of the Code which is ambiguous, contradictory, confusing or requiring of constructive interpretation. There being no ambiguity and nothing left to conjecture, there is no need for interpre-

tation. The legislature intended to regulate narcotic drugs by requiring prescriptions, but exempted certain medicinal preparations containing only a small amount of narcotic drugs. That exemption section of the Code was qualified by the use of the words "Except as specifically provided" so as not to conflict with the entire narcotic act. *Section 3719.16, Revised Code,* specifically provides that only one exempted preparation can be lawfully purchased in any forty-eight hour period. Clearly, it is a limitation designed to guard against abuse of the freedom to purchase some substances which contain narcotic drugs where the control over narcotic traffic is rigidly and strictly enforced.

A penal statute which describes the offense with reasonable certainty is not void for uncertainty.

> "The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct." *Jordan* v. *George,* 341 U. S. 223.
>
> "Difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness, and the impossible standards of specificity are not required, and the test is whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice." *Jordan* v. *George, supra.*

SUMMARY AND CONCLUSION

There is no conflict in the language of *Sections 3719.15 and 3719.16, Revised Code,* compared to one another, nor in comparing them with the language of any of the other sections of the Narcotic Act. And, there is no conflict between the wording of paragraphs one and two

within *Section 3719.16, Revised Code,* itself. Paragraph one pertains to the selling or dispensing of exempted narcotic drug preparations, and paragraph two pertains to the obtaining of such preparations.

There is, likewise, no ambiguity or vagueness in the language used. The language used by the legislature in *Section 3719.16, Revised Code,* is plain and conveys a clear and definite meaning and does not require any conjecture or interpretation.

Ignorance of the law cannot be used as an excuse to commit crime, nor does amenability to the criminal laws of this State require a particular kind or degree of education.

The section here complained of is written in ordinary language, and the words, given their ordinary meaning, define the act or acts prohibited. The fact that the defendants-appellants do not have a chemical or mathematical education, or the fact that the name paregoric is not set forth in any of the narcotic sections of the Code, does not support a claim of a violation of the defendants'-appellants' civil rights or deprive them of due process.

Section 3719.16, Revised Code of Ohio, does not violate the provisions of *Article I, Sections 1, 16 and 19 of the Constitution of Ohio,* and does not violate the *Fourteenth Amendment to the Constitution of the United States of America.*

Paragraph 2 of said Section 3719.16 of the Ohio Revised Code is neither vague nor indefinite, and does not violate the due process clause of the Fourteenth Amendment, and is not an abusive nor discriminatory exercise of the police powers of the state.

It is further respectfully submitted that, as applied here, the penal provisions of said Section are not cruel and unusual.

For these reasons appellee respectfully submits that the Motion to Dismiss this Appeal should be allowed, and the appeal dismissed.

Respectfully submitted,

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